UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GARY JACKSON, et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Docket No. 00-142-P-H***
	)	
PAUL A. KOROSKI, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTION TO DISMISS

The defendants, five members of the board of directors of Carleton Woolen Mills, Inc. and trustees of the Carleton Woolen Mills, Inc. Manufacturing Employee Benefit Plan ("the Plan") and one officer of Carleton Woolen Mills, Inc., have moved to dismiss[1] all counts of the amended complaint. I recommend that the court grant the motion.

[1] The plaintiffs assert that "[b]y attaching matters outside of the pleadings, Defendants have required that the Motion 'shall be treated as one for summary judgment,'" and go on to argue that the defendants' failure to comply with this court's Local Rule 56 governing motions for summary judgment is sufficient reason for the court to deny the motion. Plaintiffs' Opposition to Defendants' Motion to Dismiss the Amended Complaint, etc. ("Plaintiffs' Opposition") (Docket No. 33) at 2. The plaintiffs quote only a single phrase from Fed. R. Civ. P. 12(b), taking it out of context and misrepresenting the rule's import. When matters outside the pleadings are presented to the court on a motion to dismiss invoking Rule 12(b)(6), the court is not "required" to treat the motion as one for summary judgment. Only if the court does not exclude such matters is the motion so treated. In this instance, I will consider no materials outside the pleadings and will treat the motion solely as a motion to dismiss. The plaintiffs also assert, in support of their argument on this point, that "[a]t a hearing on July 14th, Magistrate Judge Cohen specifically inquired of counsel to Defendants as to whether or not he understood that Defendants' Motion to Dismiss would be treated as a Motion for Summary Judgment and defense counsel affirmed that understanding." Plaintiffs' Opposition at 2. The transcript of that hearing reveals that this is a serious misrepresentation of the exchange that took place. Counsel for the plaintiffs took the position at that hearing that the instant motion "will undoubtedly be treated by the Court as a motion for summary judgment." Transcript of Hearing (July 14, 2000) (Docket No. 17) at 12. I asked counsel for the defendant: "I'm interested in what you have to say in response to Mr. Beal's suggestion that what you've really filed here is a motion for summary judgment. . . . [I]s it a motion for summary judgment?" *Id*. at 24. Counsel for the defendants replied: "No." *Id*. It is quite clear that defense counsel did not "affirm" any "understanding" that this motion would be treated as one for summary judgment, and it will not be so treated.

I. Applicable Legal Standard

The defendants contend that this action should be dismissed because the amended complaint fails to state a claim upon which relief may be granted, Defendants' Motion to Dismiss the Amended Complaint, etc. ("Motion") (Docket No. 7) at 2, thereby invoking Fed. R. Civ. P. 12(b)(6). "When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in her favor." *Pihl v. Massachusetts Dep't of Educ*., 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if "it appears to a certainty that the plaintiff would be unable to recover under any set of facts." *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Tobin v. University of Maine Sys.*, 59 F.Supp.2d 87, 89 (D. Me. 1999).

II. Factual and Procedural Background

The amended complaint includes the following relevant factual allegations. The four individual plaintiffs were employees of Carleton Woolen Mills, Inc., employed pursuant to a collective bargaining agreement and eligible for benefits under the Plan. Amended Complaint (Docket No. 2) ¶¶ 3-9. The individual defendants, other than Paul Koroski, were members of the board of directors of Carleton Woolen Mills, Inc. and trustees of the Plan. *Id*. ¶¶ 11-16. Koroski was the chief financial officer of Carleton Woolen Mills, Inc., and is alleged to have been a fiduciary of the Plan. *Id*. ¶¶ 18, 23. Carleton Woolen Mills, Inc. was the administrator, settlor and sponsor of the Plan. *Id*. ¶¶ 24-25.

A collective bargaining agreement was in effect between Carleton Woolen Mills, Inc. and the Paper, Allied-Industrial, Chemical and Energy Workers International Union and its Local 1-1235 ("the Union") for the period September 14, 1998 through September 15, 2001. *Id*. ¶ 26. The Plan, instituted in according with Article IX of the collective bargaining agreement, is an employee benefit plan

within the meaning of the Employee Retirement Income Security Act ("ERISA") and specifically 29 U.S.C. § 102(3). *Id*. ¶ 28.

Beginning on or about March 8, 2000 the plaintiffs and the Union have requested certain information from the defendants and their attorneys, which has not been provided. *Id*. ¶¶ 34-36. On or before June 1, 1999 the defendants caused the Plan administrator to stop funding medical benefits for Plan participants and beneficiaries and to stop paying medical benefits to them. *Id*. ¶¶ 38-39. The defendants have refused to administer or manage the Plan since on or before June 1, 1999 and have mismanaged and misappropriated funds contributed by employees and designated by Carleton Woolen Mills, Inc. or its parent corporation for payment of benefits by the Plan. *Id*. ¶¶ 41-43. Also since on or before that date the defendants have allowed the Plan's third party administrator falsely to represent to participants and beneficiaries that their medical benefits were being paid in accordance with the Plan. *Id*. ¶¶ 46-47.

On or about December 19, 1999 Carleton Woolen Mills, Inc. suspended manufacturing operations. *Id*. ¶ 50. On and after January 1, 2000 the defendants refused to accept contributions tendered by employees for continued coverage under the Plan, caused the plan administrator to refuse to accept payment of premiums, and caused the plan administrator to refuse to extend continuation coverage to participants and beneficiaries. *Id*. ¶¶ 51-53. On or about February 18, 2000 Carleton Woolen Mills, Inc. recalled its employees on an intermittent basis. *Id*. ¶ 54. Employees who were participants in the Plan were laid off on various dates up to April 15, 2000. *Id*. ¶ 55. On or before April 11, 2000 the defendant trustees instructed Koroski to tell all participants that the Plan had been terminated. *Id*. ¶ 57. On or about April 11, 2000 Koroski announced that the Plan would terminate effective April 21, 2000. *Id*. ¶ 58. Effective April 21, 2000 the defendants announced that they would not provide any continuation coverage. *Id*. ¶ 59. Since April 21, 2000 the defendants have refused to

pay any medical benefits under the Plan for charges incurred on or after that date or to accept employee contributions for continuation coverage. *Id*. ¶¶ 61-62. Since May 3, 2000 the defendants have refused to pay any medical benefits under the Plan for charges incurred before April 21, 2000. *Id*. ¶ 60.

Prior to November 4, 1999 the defendants caused the plan administrator to maintain fiduciary liability insurance in the amount of $3,000,000 to pay participants and beneficiaries for breaches of their duties as fiduciaries. *Id*. ¶ 65. On or before November 4, 1999 the defendants caused the plan administrator to reduce the amount of this insurance to $1,500,000. *Id*. ¶ 66. On or before November 4, 1999 the defendants caused the plan administrator to increase the amount of fiduciary liability insurance coverage for defense costs from zero to $1,500,000. *Id*. ¶ 67.

Plan beneficiaries have been deprived of payment of over $400,000 in medical claims incurred before April 21, 2000. *Id*. ¶ 71.

The plaintiffs seek legal and equitable relief under ERISA and the Labor Management Relations Act ("LRMA"), 29 U.S.C. § 185, against the defendants for breach of fiduciary duty in the operation and alleged abandonment of the Plan (Counts I-IV, VII and VIII of the amended complaint); recovery "on behalf of" the Plan for such breaches (Counts V, VI, IX and X); recovery for the alleged failure to provide information, also under ERISA and LMRA (Count XI); and recovery for themselves, a proposed class[2] and the Plan for the alleged reduction of insurance coverage (Count XII).

This action is complicated by the fact that Carleton Woolen Mills, Inc. has been before the bankruptcy court in this district since February 17, 2000 in a Chapter 11 proceeding. Complaint, Adversary Proceeding, *Carleton Woolen Mills, Inc. v. Gary Jackson, et al.*, United States Bankruptcy Court, District of Maine, Exh. A to Motion to Revoke Reference Pursuant to 28 U.S.C. § 157(d), etc.

[2] Counts I-IV, VII-VIII, and XI are all entitled "Individual Plaintiffs' Claims" but demand relief "on behalf of themselves and all (continued…)

(Docket No. 8), ¶ 6. On August 2, 2000 that court issued a temporary stay order providing, in pertinent part, that the defendants in that adversary proceeding, who are the plaintiffs in this proceeding, may not

> (a) seek any injunctive relief in [this proceeding] against Heller et al. in their capacities as officers, directors, former officers, and/or former directors of [Carleton Woolen Mills, Inc.];
>
> (b) seek any injunctive relief in [this proceeding] that implicates, insofar as [Carleton Woolen Mills, Inc.] or its assets or liabilities is concerned, the reestablishment, administration, or operation of any benefit plan formerly established and operated by [Carleton Woolen Mills, Inc.], or the board of directors of [Carleton Woolen Mills, Inc.], including, without limitation, the Carleton Woolen Mills, Inc. Manufacturing Employee Benefit Plan;
>
> (c) seek any injunctive relief in [this proceeding] that requires [Carleton Woolen Mills, Inc.] or the board of directors of [Carleton Woolen Mills, Inc.], to take any action as sponsor or administrator of any benefit plan formerly established and operated by [Carleton Woolen Mills, Inc.], including, without limitation, the Carleton Woolen Mills, Inc. Manufacturing Employee Benefit Plan;
>
> (d) litigate any issue related to the validity, legality, propriety and/or effect of any termination or purported termination of the Carleton Woolen Mills, Inc. Manufacturing Employee Benefit Plan, except insofar as the liability of the individual Defendants is concerned;
>
> (e) litigate any issue that implicates any issue arising under 11 U.S.C. § 1113, including, without limitation, whether termination of any employee benefit plan did or did not violate § 1113[.]

Temporary Stay Order, *Carleton Woolen Mills, Inc. v. Gary Jackson, et al.*, Adv. Proc. No. 00-1046, United States Bankruptcy Court, District of Maine ("Temporary Stay Order"), Exh. A to Defendants' Reply Memorandum in Support of Motion to Dismiss the Amended Complaint ("Defendants' Reply") (Docket No. 35), at 2-3. The parties disagree about the extent to which this order applies to the claims asserted by the plaintiffs in the instant proceeding.

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members of the class."

III. Discussion

The amended complaint includes twelve counts, each of which alleges a breach of fiduciary obligations under ERISA and a violation of the LMRA. The defendants seek dismissal of the claims asserted under the LMRA on grounds distinct from those providing the basis for their motion to dismiss the claims asserted under ERISA. They also address separately Counts XI and XII as well as all claims asserted against defendant Koroski. I will address the motion in the categories established by the defendants.

A. LMRA Claims

The defendants contend that all claims asserted against them under the LMRA should be dismissed because the amended complaint fails to allege that the plaintiffs have exhausted the remedies available under the collective bargaining agreement; the plaintiffs lack standing to enforce the rights they allege have been violated; and the defendants cannot be liable as individuals under 29 U.S.C. § 185,[3] the only section of the LMRA invoked by the amended complaint. Motion at 6-8. I find the third argument to be dispositive.

The defendants, alleged to be officers or directors of Carleton Woolen Mills, Inc. and, except

[3] That statute merely provides that "[s]uits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties."

for Koroski, trustees of the Plan, Amended Complaint ¶¶ 12-16, 18, 24, are not alleged to have been parties to the collective bargaining agreement claimed to have been violated, *id*. ¶ 26. The individual plaintiffs are not alleged to have been members of the union that was a party to the collective bargaining agreement, but have asserted that they were "employed pursuant to" that agreement. *Id*. ¶¶ 3, 5, 7, 9. In *Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421 (1st Cir. 1968), the First Circuit held that the federal courts lack jurisdiction under 29 U.S.C. § 185 over defendants who are not parties to a contract creating an employee benefit fund, even when that contract resulted from collective bargaining. *Id*. at 423. The amended complaint in this case alleges that the individual defendants breached the collective bargaining agreement, if at all, by acting as agents of Carleton Woolen Mills, Inc., one of the two parties to the collective bargaining agreement, the other being the union. Amended Complaint ¶¶ 17, 26-32. The individual plaintiffs are specifically prohibited by the bankruptcy court's order from seeking injunctive relief against the defendants in their capacities as officers, directors, former officers, or former directors of Carleton Woolen Mills, Inc. Any other alleged basis for individual liability under section 185 is not apparent on the face of the amended complaint.

The plaintiffs argue that "[i]n the First Circuit, individual officers may be held personally liable for the obligations of the employer under ERISA and the LMRA." Plaintiffs' Opposition at 7. However, with one exception, the case law they cite in support of this assertion deals only with ERISA claims and in all cases deals only with the liability of corporate officers for employer contributions that have not been made to employee benefit funds. The point here, as emphasized by the bankruptcy court's order, is that recovery is sought against the defendants in their capacities as trustees of the fund and not in their capacities as corporate officers or directors. In the one case cited by the plaintiffs that does mention a claim brought under the LRMA, *Massachusetts State Carpenters Pension Fund v. Atlantic Diving Co.*, 635 F. Supp. 9 (D. Mass 1984), the corporation that had entered

into the collective bargaining agreement had been named as a defendant, and the only issue was whether the plaintiffs could recover delinquent contributions to a pension fund due under the collective bargaining agreement from unspecified corporate officers, *id*. at 11-12. Here, neither the Plan nor its trustees are parties to the collective bargaining agreement. And again, the plaintiffs' ability to recover against the named defendants here is limited to liability due to their status as something other than officers or directors of Carleton Woolen Mills, Inc., which can only be their status as trustees of the Plan. The cited case law is distinguishable.

If the agents or members of a union cannot be sued individually under section 185 for damages for violation of a collective bargaining contract for which damages the union itself is liable, *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 249 (1962), it follows that the trustees of an employee benefit plan established pursuant to a collective bargaining agreement cannot be sued individually under section 185 for damages for violation of that contract for which the employer, the party to the collective bargaining agreement and the sponsor of the plan, itself would be liable. The trustees are even more removed from the collective bargaining agreement than were the agents of the union.

Accordingly, neither equitable relief nor damages is available to these plaintiffs on their claims under the LMRA. I conclude that any claims asserted against the defendants under 29 U.S.C. § 185 should be dismissed.[4]

B. Count XI

[4] I note in the alternative that the defendants' argument that the plaintiffs lack standing to bring the claims set forth in the amended complaint under the LMRA also appears to have merit. Members of a union have standing to sue under section 185 only when they assert "uniquely personal rights of employees such as wages, hours, overtime pay, and wrongful discharge." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976). Contrary to the plaintiffs' assertion that "[t]he cessation of all medical benefits to employees must be considered somewhere between wages and wrongful discharge on the continuum of 'uniquely personal rights,' and hence individually enforceable," Plaintiffs' Opposition at 7, their allegations deal with a right that runs to all employees under the collective bargaining agreement; the fact that individual members of the union might benefit in varying degrees does not make the contractual obligation anything other than a right common to all members. *See, eg., Gutierrez v. United Foods, Inc.*, 11 F.3d 556, 560 (5th Cir. 1994); *Brown v. Sterling Aluminum Prods. Corp.*, 365 F.2d 651, 657 (8th Cir. 1966).

In Count XI of the amended complaint, the plaintiffs allege that the defendants' failure to produce on demand certain information "constitute[s] breaches of their fiduciary obligations under ERISA §1166(4)(A), and a violation of the LMRA." Amended Complaint ¶ 112. The information at issue is specified in paragraph 34 of the amended complaint. The plaintiffs' response to the defendants' arguments in support of their motion to dismiss this count does not mention any contractual right to this information or any other basis for liability under the LMRA. Plaintiffs' Opposition at 16-17. Even if any such claim were not deemed waived by the failure to present any argument in support under these circumstances, no basis for such a claim under the LMRA is apparent on the fact of 29 U.S.C. § 185 or from an indulgent reading of the amended complaint. Accordingly, Count XI should be dismissed to the extent that it purports to assert a claim under the LMRA.

Under ERISA, a plan administrator must provide notice to beneficiaries under certain circumstances, 29 U.S.C. § 1166(a)(4), and the failure to do so or to comply with a request for information that the administrator is required by ERISA to furnish to a participant or beneficiary subjects the administrator to personal liability to the participant or beneficiary, 29 U.S.C. § 1132(c)(1). Claims such as that set forth in Count XI may be brought only against designated plan administrators. *Thorpe v. Retirement Plan of Pillsbury Co*., 80 F.3d 439, 444 (10th Cir. 1996). Under ERISA, an "administrator" is defined as "the person specifically so designated by the terms of

the instrument under which the plan is operated." 29 U.S.C. § 1002(16)(A)(i). The plaintiffs do not dispute the defendants' assertion that the Plan designates Carleton Woolen Mills, Inc. as the administrator, Motion at 14; Plaintiffs' Opposition at 16-17; Amended Complaint ¶ 24, but contend that "a non-administrator can be considered a 'de facto plan administrator' by assuming duties of the plan administrator," Plaintiffs' Opposition at 17. They cite *Law v. Ernst & Young*, 956 F.2d 364 (1st Cir. 1992), in which the First Circuit held that a defendant who had "assumed and controlled the plan administrator's function of furnishing required information in response to a plan beneficiary's request" could be held liable under this section of ERISA, *id*. at 372. The problem with this argument is that the amended complaint fails to allege that any of the defendants assumed the duties of the plan administrator. There are references to a third-party plan administrator, Amended Complaint ¶¶ 44, 46-47; numerous allegations that the defendants directed the activity of the plan administrator, which is not otherwise identified but cannot, given the context, be the defendants, *id*. ¶¶ 38-39, 52-53, 65-68; and indeed an allegation that the defendants have "refused to administer the Plan," *id*. ¶ 41.

Given the failure to plead that any of the defendants was an administrator of the Plan at the relevant time, it is not necessary to address the defendants' alternative argument that none of the information sought by the plaintiffs is included within ERISA's definitions of information that must be provided upon request of a participant or beneficiary. Count XI should be dismissed.

C. Count XII

Count XII of the amended complaint alleges that the defendants breached their fiduciary duties under ERISA and violated the LRMA by reducing the amount of the fiduciary liability insurance coverage that might cover the plaintiffs' substantive allegations and increasing the amount of coverage for costs of legal defense under that policy, as set forth in paragraphs 66-69 of the amended complaint. Amended Complaint ¶ 115. Again, there is nothing in the amended complaint or in the plaintiff's

opposition to the motion that so much as suggests how this claim is cognizable under the LMRA, and it should be dismissed to the extent that it seeks relief under that statute.

The defendants first contend that coverage under the policy at issue in fact remains at the $3 million level and has not been reduced, Motion at 15, but that is more appropriately an issue to be decided in the context of a motion for summary judgment. The defendants next argue that ERISA does not require that plan fiduciaries maintain any fiduciary liability insurance at all, so that any amendment of such a policy to reduce coverage would be "entirely permissible." *Id*. The plaintiffs admit that "the issues raised in Count XII are a question of first impression," but argue that

> it would do injustice to deny Plaintiffs an opportunity to discover and present evidence that the Defendants used Plan funds to purchase liability insurance to cover claims against the Trustees for breaches of fiduciary duty and then, during a period of time such breaches were occurring, reduced the amount of insurance available to cover such claims, in order to benefit themselves by increasing the coverage of their litigation expenses.

Plaintiffs' Opposition at 17-18. First, the amended complaint does not allege that the plaintiffs' claims will exceed a total of $1,500,000, the amount of insurance coverage which the amended complaint alleges remains available, Amended Complaint ¶ 66, so the claim asserted in Count XII appears at best to be premature and at worst to allege no damage to the plaintiffs. Further, in the absence of any statutory or case law authority suggesting that ERISA plan trustees have a fiduciary duty to obtain liability insurance covering any breach of their fiduciary duties, a court should be reluctant to recognize the cause of action proposed by the plaintiffs here. These defendants could have chosen to serve as trustees of the Plan without the personal protection of any insurance. There is no suggestion in the amended complaint that the premium for this insurance was itself so significant that it resulted in the lack of funds to pay the plaintiffs' benefit claims. Under the circumstances, Count XII should be dismissed for failure to state a claim upon which relief may be granted.

D. Koroski's Liability

The defendants seek dismissal of all claims against defendant Koroski, asserting that he cannot be held liable for a breach of fiduciary duty because he was neither a named fiduciary nor a functional fiduciary with respect to the Plan. Motion at 12-13. They contend that the court "is not obliged to accept [the amended complaint's] conclusory allegation" that Koroski was in fact a Plan fiduciary, Amended Complaint ¶ 23, because the plaintiffs "cannot allege that Koroski is a member of [Carleton Woolen Mills, Inc.'s] Board of Directors or a named fiduciary of the Plan or that he exercised discretionary authority over the Plan," Motion at 12-13. This is essentially a factual argument, dependent upon materials outside the pleadings and not appropriate for resolution in the context of a motion to dismiss. If I did not conclude that dismissal of all claims is appropriate on other grounds, dismissal of the claims against Koroski would not be warranted on this ground.

E. ERISA Claims

The defendants concede that any properly alleged claims under section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), "for relief *solely* against Defendants in their individual capacities for breach of fiduciary duties as set forth in *Varity Corp. v. Howe*, 516 U.S. 489 (1996)," should not be dismissed. Defendants' Reply at 2, 8 (emphasis in original). They do not identify any such claims in the amended complaint, however, and continue to argue that all ERISA claims must be dismissed for a variety of reasons. The amended complaint alleges violations of 29 U.S.C. § 1132(a)(1)(B), (a)(2) and (a)(3). Amended Complaint ¶¶ 76, 80, 84, 88, 91, 94, 98, 102, 106, 110.

In *Varity*, the plaintiffs were beneficiaries of a self-funded employee welfare benefit plan who were induced by their employer to switch to a new employer, a corporate subsidiary with a new self-funded plan. 516 U.S. at 492-93. When the new subsidiary failed within two years, the employees sued their original employer, alleging that it had breached its fiduciary duty to them as beneficiaries of the initial plan. *Id*. at 491-92. The Supreme Court held that individual beneficiaries of an ERISA

benefit plan could sue the plan fiduciaries under 29 U.S.C. § 1132(a)(3) for individual relief. *Id*. at 509-14. The Court found it significant that the plaintiffs, who were no longer members of the original plan and therefore could not seek individual relief under 29 U.S.C. § 1132(a)(1), would have no individual remedy unless it was available under subsection 3. *Id*. at 515. The defendants here argue that, because the plaintiffs would be able to seek individual relief under 29 U.S.C. § 1132(a)(1) if they had exhausted the available administrative remedies, they are not entitled under *Varity* to seek relief pursuant to 29 U.S.C. § 1132(a)(3). Reply Memorandum at 11. I will discuss this argument after I consider the defendants' arguments with respect to subsections (a)(1) and (a)(2).

Section 1132 provides, in relevant part:

> **(a) Persons empowered to bring a civil action**
> A civil action may be brought —
> **(1)** by a participant or beneficiary —
> **(A)** for the relief provided for in subsection (c) of this section, or
> **(B)** to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> **(2)** by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> **(3)** by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]

29 U.S.C. § 1132. Section 1109 provides, in relevant part:

> **(a)** Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. § 1109.

The defendants first contend that Counts V, VI, IX, X, and XII should be dismissed because they are asserted "on behalf of" the Plan. Motion at 9. While it is true that a plan is not among the possible plaintiffs listed in the portions of section 1132(a) quoted above, section 1132(a)(2), read in conjunction with 29 U.S.C. § 1109(a), clearly provides for a recovery that inures to the plan, and that appears to be what is sought by the amended complaint. Perhaps, if the court adopts my recommendation that any claims for relief under the LMRA be dismissed, and any other claims remain after the disposition of this motion, the Plan should be dismissed as a named party plaintiff, but the individual plaintiffs have standing to seek recovery of funds that would go to the Plan rather than directly to them.

1. Section 1132(a)(1)(B)

The defendants contend that the plaintiffs' claims under 29 U.S.C. § 1132(a)(1)(B) must be dismissed because the amended complaint does not allege that they have exhausted the administrative appeal process set forth in the plan. Motion at 10. "Before pursuing the[] remedies [available under section 1132(a)(1)(B)] in federal court, a participant must exhaust administrative remedies available under the plan." *Belanger v. Healthsource of Maine*, 66 F.Supp.2d 70, 73 (D. Me. 1999). "Until a plan participant has exhausted or reached an impasse under a plan's administrative procedures, it is inappropriate for the courts to review a claim that has not been 'fully considered' by the plan itself." *Id*. *See also Terry v. Bayer* Corp., 145 F.3d 28, 36 (1st Cir. 1998) ("[W]e have determined that a prerequisite to obtaining judicial review under § 1132(a)(1)(B) is that the claimant have exhausted the internal administrative remedies available to him.") The plaintiffs respond that the exhaustion requirement applies only to claims of denial of benefits, apparently contending that they do not raise such claims but only seek "recovery of benefits" and only allege breach of fiduciary duties, illegal

termination of benefits, and misuse or conversion of Plan assets. Plaintiffs' Opposition at 11-12. The language of section 1132(a)(1)(B) itself makes clear that it governs only claims by which an individual seeks to recover benefits for himself, enforce his own rights under the plan or to clarify his rights to future benefits; breach of fiduciary duties provides a basis for recovery only under section 1132(a)(2) and (3). Allegations of misuse or conversion of plan assets also fit within the scope of the latter two subsections. An action for illegal termination of a plan, which is the only context in which "illegal termination of benefits" can reasonably be read to be alleged in the second amended complaint, is appropriately brought against the plan itself or the plan sponsor, *see Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) (termination of plan an act of plan sponsor not fiduciary in nature), not the plan trustees.

Therefore, only the individual plaintiffs' claims for "recovery of benefits" are at issue with respect to their claims under section 1132(a)(1)(B). The plaintiffs do not explain how a claim for "recovery of benefits" so differs from a claim based on "denial of benefits" that case law using the latter term is not applicable here. The relief sought by the amended complaint, other than in the counts concerning requests for information and maintenance of insurance, is that "the Court . . . [o]rder Defendants to pay all medical benefits in accordance with the Medical Plan, from June 1, 1999 through April 21, 2000," Amended Complaint ¶¶ 76(A), 84(A), 91(A), or "from April 21, 2000 through present [sic] and on an ongoing basis," *id*. ¶¶ 80(A), 88(A), 94(A), 98(A), 102(A), 106(A), 110(A). This appears to be precisely the sort of claim that requires exhaustion under ERISA; different characterizations of the claims cannot serve to overcome the requirement. *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 826 (1st Cir. 1988). While an exception to the requirement exists "when resort to the administrative route is futile or the remedy inadequate," *id*. (citation omitted), the amended complaint fails to allege futility of the required procedures or inadequacy of the

remedy. The plaintiffs do not address either alternative in their opposition to the motion to dismiss. Calling the request for payment of medical benefits a claim for breach of fiduciary duty does not change the nature of the claim nor the fact that section 1132(a)(1)(B) is not the statutory basis for claims of breach of fiduciary duty. *See generally Weiner v. Klais & Co*., 108 F.3d 86, 91 (6th Cir. 1997).

Accordingly, the plaintiffs' claims, to the extent that they invoke 29 U.S.C. § 1132(a)(1)(B), should be dismissed.

2. Section 1132(a)(2)

The plaintiffs concede that, in seeking recovery against the trustee defendants under 29 U.S.C. § 1132(a)(2), they are acting in a representative capacity on behalf of the Plan and that any relief awarded on such a claim "inures to the benefit of the Plan as a whole." Plaintiffs' Opposition at 10. *See generally Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140-42 (1985). The defendants contend that any such claims accordingly belong in the bankruptcy court, apparently because the assets of the Plan are the property of the settlor, Carleton Woolen Mills, Inc. Defendants' Reply at 8. The defendants in effect ask this court to decide an issue that the bankruptcy court, for all that appears in its stay order, has not yet decided. That order provides that the plaintiffs may not seek injunctive relief in this action that, "insofar as [Carleton Woolen Mills, Inc.] or its assets or liabilities is concerned, the reestablishment, administration, or operation of any benefit plan . . . including the Carleton Woolen Mills, Inc. Manufacturing Employee Benefit Plan." Temporary Stay Order at 2. If the assets or liabilities of the Plan are those of Carleton Woolen Mills, Inc., the plaintiffs' claim under section 1132(a)(2) appears to be barred by the bankruptcy court's order.

One bankruptcy court has held that a "forced savings account," an ERISA employee welfare benefit plan, as opposed to an ERISA-qualified pension plan, may not be excluded from the bankrupt

estate of the settlor because it is not required to include restrictions on alienation. *In re Silva*, 246 B.R. 636, 637-38 (D.Nev. 2000). I find that court's reasoning persuasive and have been unable to locate any other reported case law on point. Under *Silva*, the plaintiffs are barred from pursuing any claims under section 1132(a)(2) by the temporary stay order.

Even if that were not the case, the only purpose for which the amended complaint can reasonably be read to seek the payment of money by the defendants into the Plan is so that the plaintiffs' claims for medical benefits, and the claims of the class they seek to represent, can be paid by the Plan. Such payment would constitute relief "that requires [Carleton Woolen Mills, Inc.] or [its] board of directors . . . to take . . . action as sponsor or administrator of . . . the Carleton Woolen Mills, Inc. Manufacturing Employee Benefit Plan," relief which the plaintiffs have also been ordered by the bankruptcy court not to pursue. Temporary Stay Order at 2.

For the foregoing reasons, the plaintiffs' claims based on 29 U.S.C. § 1132(a)(2) should be dismissed.

3. Section 1132(a)(3).

While the defendants now concede that the plaintiffs may press a claim under 29 U.S.C. § 1132(a)(3), Defendants' Reply at 2, 8, they contend that *Varity* bars such claims when other relief is available under ERISA and that the plaintiffs have such relief available under 29 U.S.C. § 1132(a)(1)(B), although they have not alleged those claims appropriately, *id*. at 10-11. In *Varity*, the Supreme Court held that the words of section 1132(a)(3) "are broad enough to cover individual relief for breach of a fiduciary obligation," 516 U.S. at 510, and that "one can read [29 U.S.C. § 1109, establishing liability for breach of fiduciary duty] as reflecting a special congressional concern about plan asset management without also finding that Congress intended that section to contain the exclusive set of remedies for every kind of fiduciary breach," *id*. at 511. It went on to construe section 1132(a)

as a whole, noting that its "structure suggests that [subsections (3) and (5)] act as a safety net, offering appropriate equitable relief for injuries caused by violations that [section 1132] does not elsewhere adequately remedy." *Id*. at 512. Finally, in a passage upon which the defendants rely, the Court said "we should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate.'" *Id*. at 515. The plaintiffs in *Varity* could not press their individual claims under section 1132(a)(1)(B) because they were no longer members of the welfare benefit plan at issue. *Id*. "They must rely on the *third* subsection or they have no remedy at all." *Id*.

The *Varity* opinion does not clearly require dismissal of claims under section 1132(a)(3) whenever plaintiffs could have proceeded under section 1132(a)(1)(B). When, as will be the case here if the court adopts my recommendation, a plaintiff's claims under section 1132(a)(1)(B) are dismissed due to the failure to allege exhaustion of administrative remedies, the question whether there is avenue for relief under ERISA in addition to a claim under section 1132(a)(3) arises. Because the plaintiffs have not alleged that resort to administrative remedies under the Plan would be futile or inadequate, there is no need at this time to consider whether such a state of affairs would in effect render section 1132(a)(3) the only available source of a remedy. In *Tolson v. Avondale Indus., Inc.*, 141 F.3d 604 (5th Cir. 1998), the appellate court upheld a district court's dismissal of claims under section 1132(a)(3) because the plaintiff "has adequate redress for disavowed claims through his right to bring suit pursuant to section 1132(a)(1)." *Id*. at 610 (quoting district court opinion).[5] The situation at hand appears sufficiently similar to require a similar result. *Varity*'s emphasis on the availability of other relief under section 1132(a), while not unqualified, does suggest that section 1132(a)(3) is to be reserved for cases in which no other relief is available under ERISA. The

[5] The district court did note that the plans at issue in *Tolson* were "viable" and that relief "was available" under section 1132(a)(1), (continued…)

amended complaint fails to assert that such is the case here. Accordingly, I conclude that the plaintiffs' claims under section 1132(a)(3) should be dismissed.

F. Other Arguments

My recommendation that all claims set forth in the amended complaint be dismissed for the reasons set forth above makes it unnecessary to address the defendants' arguments that the plaintiffs must submit their breach-of-contract claims to arbitration, are not entitled to consequential or punitive damages and seek relief that is available only against the plan sponsor, Motion at 6-7, 11-12, and that the contract claims must fail for lack of an allegation providing a basis for piercing the corporate veil, Defendants' Reply at 6-7.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion to dismiss be **GRANTED** and that the dismissal of the amended complaint be without prejudice.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 27th day of October, 2000.

David M. Cohen
United States Magistrate Judge

although the plaintiff did not prevail on that claim. *Id*.

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CARLETON WOOLEN MILLS INC MANUFACTURING EMPLOYEE BENEFIT PLAN plaintiff	JONATHAN S. R. BEAL, ESQ. (See above) [COR LD NTC]

v.

PAUL A KOROSKI defendant	PHILIP J. MOSS 775-6110 [COR LD NTC]

Proceedings include all events.
2:00cv142 JACKSON, et al v. KOROSKI, et al

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